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EVERYDAY INTELLECTUAL PROPERTY

Debora Halbert*

JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY* (STANFORD UNIVERSITY PRESS 2014). PP. 368. PAPERBACK \$25.95

Legal researchers have dominated the study of intellectual property, in part because until recently IP law was not of significant interest to many disciplines outside the law.¹ As scholars outside the legal field (or those with dual degrees within the legal field) have taken up the investigation of IP and its implications, other approaches to understanding IP that move beyond purely legal analysis have been published.² As more controversial legal decisions were made and IP legal issues took on more popular appeal, it became increasingly obvious that empirical work would be necessary if the primary assertions used to justify the law and its ongoing expansion were to be proven true (or false).

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1. *See generally* YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006); JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* (2008); LAWRENCE LESSIG, *CODE: AND OTHER LAWS OF CYBERSPACE, VERSION 2.0* (2006); LAWRENCE LESSIG, *REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY* (2008); LAWRENCE LESSIG, *FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY* (2005); NEIL WEINSTOCK NETANEL, *COPYRIGHT'S PARADOX* (2008); JESSICA LITMAN, *DIGITAL COPYRIGHT* (2006); JEFFERSON POWELL & DAVID LANGE, *NO LAW* (2009); KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, *THE KNOCKOFF ECONOMY: HOW IMITATION SPURS INNOVATION* (2012); John Tehranian, *Dangerous Undertakings: Sacred Texts and Copyright's Myth of Aesthetic Neutrality*, 418-30 (Matthew David & Debora J. Halbert eds., 2014); COPY FIGHTS: *THE FUTURE OF INTELLECTUAL PROPERTY IN THE INFORMATION AGE* (Adam Thierer & Clyde Wayne Crews Jr. eds., 2002); YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006).

2. *See generally* BOATEMA BOATENG, *THE COPYRIGHT THING DOESN'T WORK HERE: ADINKRA AND KENTE CLOTH AND INTELLECTUAL PROPERTY IN GHANA* (2011); MICHELE BOLDRIN & DAVID K. LEVINE, *AGAINST INTELLECTUAL MONOPOLY* (2008); Jeremy F. DeBeer & Christopher D. Clemmer, *Global Trends in Online Copyright Enforcement: A Non-Neutral Role for Network Intermediaries?*, 49 JURIMETRICS 375 (2009); William T. Gallagher, *Trademark and Copyright Enforcement in the Shadow of IP Law*, 28 SANTA CLARA COMPUTER & HIGH TECH. L.J. (2012); Stefan Larsson, *Copy Me Happy: The Metaphoric Expansion of Copyright in a Digital Society*, 26 INT'L J. SEMIOTICS L. 615-34 (2013); CHRISTOPHER MAY, *A GLOBAL POLITICAL ECONOMY OF INTELLECTUAL PROPERTY RIGHTS: THE NEW ENCLOSURES?* (1st ed. 2000); Stefan Larsson, *Copy Me Happy: The Metaphoric Expansion of Copyright in a Digital Society*, 26 INT'L J. SEMIOTICS L. 615-34 (2013); Ted Sichelman & Stuart J. H. Graham, *Patenting by Entrepreneurs: An Empirical Study*, 17 MICH. TELECOMMUN. TECHNOL. L. REV. 111 (2010).

As a result, while the field remains dominated by legal scholars, an increasing volume of IP scholarship deploys qualitative and quantitative methods derived from the social sciences to ask questions about the assumptions upon which intellectual property law is built and the relationship of IP to those who use it. These methods are also utilized to better understand the impact of the law on innovation and creativity. One question these scholarly endeavors have sought to answer is just how significant IP is in providing an incentive to create. As the conventional legal argument goes, without the protection of IP, creative people would stop creating or sharing their work with a corresponding detrimental impact on progress in the arts and sciences. However, such a claim is generally asserted without much in the way of data to back it up.

It is now recognized that collecting data regarding the primary motivations for creation may be of use in better forming public policy. Policy makers could use such data to determine the best balance between strong intellectual property laws and the free flow of information. Data on innovation and creativity could also be used to determine how true the underlying justification for patent and copyright law might be and how best to strike the balance between IP protection and public use. As with any endeavor, the evidence must be gathered piece by piece. For example, there are now quantitative studies of patent uses that help clarify the role patents play in invention.³ Other work is qualitative and ethnographic, such as Boatema Boeteng's work on the interface between copyright and traditional knowledge in Ghana, indicating that conventional copyright does not work within the context of indigenous knowledge.⁴ Another example would be my interviews with anarchist publishers and content analysis of public comments about copyright, both of which suggest a far more complex understanding of how the law might function than what is currently discussed in policy circles.⁵ There is survey data published on file sharing and interview data from file sharers that make these subjects more complex than the assertions of industry representatives would have the public believe.⁶ That being said, the efforts to better understand how everyday people and creators understand and use copyright and patent protection is important if indeed the law should reflect the needs and aspirations of those it ostensibly protects.

To that end, Jessica Silbey's book, *The Eureka Myth: Creators, Innovators, and Everyday Intellectual Property*, is a wonderful addition to the growing literature grounded in social science methods and framed by a law and society approach to understanding the connections between the legal domain of intellectual property and those it is designed to help. Her book sets a high bar for what the qualitative study of IP should look like. She does this by focusing on what the law means in the everyday lives of creators, inventors, scholars, programmers, and more. Using an interview process based in "thick description," and a diverse survey, Silbey's book thoughtfully weaves together the stories told by her

3. See generally Sichelman & Graham, *supra* note 2.

4. See generally BOATENG, *supra* note 2.

5. See generally Debora Halbert, *Creativity without Copyright: Anarchist Publishers and their Approaches to Copyright Protection*, in CREATIVITY, LAW AND ENTREPRENEURSHIP (Shubha Ghosh & Paul Robin Malloy eds., 2011); Debora J. Halbert, *The Everyday Lives of Copyright*, 67 STUD. LAW POLIT. SOC. (forthcoming 2015).

6. See generally Lee Edwards et al., *Communicating Copyright: Discourse and Disagreement in the Digital Age*, in THE SAGE HANDBOOK OF INTELLECTUAL PROPERTY 300-14 (Matthew David & Debora J. Halbert eds., 2014); Larsson, *supra* note 2.

interviewees with the implications of these perspectives for our understanding of intellectual property law. In the end, she concludes that there is a fairly substantial gap between how people engaged in creative work subject to copyrights and patents use (or do not use) the law and the general perception in the legal field of how important the law is for future innovation. Among its many contributions, *The Eureka Myth* helps dislodge the prevailing assertion that only with strong intellectual property laws can further creative work be produced. In its place is a much more complex and nuanced way of understanding copyright and patent law and the people whose work these laws are supposed to protect.

In her introduction, Silbey lays out the general frame for the book and offers some conclusions that can be drawn from the interviews. With every chapter, Silbey builds her narrative from the interviews and lets the themes that emerged from these conversations guide the argument. To that end and in tension with the “one size fits all” IP system the United States has generated, Silbey finds that “[i]nterviewees demonstrate diverse ways in which IP law helps and hinders artistic and scientific productivity.”⁷ The divide amongst the interviewees tends to come down to that between creative people and scholars who see less value in copyright and patent law and the business and legal types who understand the significance these regimes have in constructing possible future value. However, one thing that emerges in the interviews throughout the book that Silbey highlights in the introduction and beyond is that even those most dedicated to the protection of “postindustrial corporate capital”⁸ are not thoughtlessly pro-IP. While the business side understands the value of the “legal fiction” of IP for business purposes, the interviewees here offer a far more nuanced and complex view of its production and worth than what might be understood to be the case by looking at the case law on the subject or the public pronouncements by industry lobbyists.

As the title indicates, the conventional wisdom about why we embrace strong IP laws—to help facilitate future innovation—is false.⁹ While the incentive story serves a purpose, Silbey’s interviews suggest that purpose is shorthand for “something more complex.”¹⁰ To that end, the ensuing chapters take on themes drawn from the interviews and complicate (as thick description is designed to do) our understanding of the relevant legal concepts.

Chapter 1 begins with the underlying justification for IP: that it somehow inspires creation. Silbey asks artists and inventors about the ineffable moment of creation, often narrated as mystical by those interested in strong IP protection. The interviews demonstrate that those engaged in creative and innovative work are not motivated by the possibility of profit so much as by exploration, problem solving, and playfulness. To the degree money matters, it matters much later after the creative moment, not before or during the act of creating.

Silbey interrogates one of the other foundational assumptions about creativity: that it is the work of a lone author or sole genius. Instead, she finds that her interviewees see

7. JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY* 7 (2014).

8. *Id.* at 13.

9. *Id.* at 15.

10. *Id.*

their success as the product of hard work and training in a specialized field. They see their contributions inspired by the creative work of others. Thus, while each of the individuals she interviewed saw their contributions as uniquely theirs, these were not separated from their larger social networks and connections. She concludes that “they cared much less about intellectual property as a form of financial investment than as a feature of their identity and personality.”¹¹ At these early stages of innovation, IP law is “largely unfelt and unseen” by those who would seem to be its primary beneficiary.¹²

Chapter 2 digs deeper into how people create to further push the assertion that individual authorship and ownership ought to be the foundation for our laws. In the second chapter, “Daily Craft: Work Makes Work,” Silbey describes the importance, for all the people she interviewed, of long hours and hard labor, as well as of having access to autonomous time and personal space.¹³ To those producing creative work, the time invested into a song or painting or sculpture can never be recaptured by monetary remuneration.¹⁴ Additionally, the more time needed to focus on the administrative and business side of things, the less time they felt they had for the creative part.¹⁵ Despite the focus on hard work by those working in creative fields, IP law, of course, does not protect “the sweat of the brow,” but instead “glorifies the individual over the collective and genius over hard work.”¹⁶ Such a disconnect is yet another way in which IP does not match the needs and interests of those working in the field.

While Silbey does not suggest an alternative method of protection, such as one based upon hourly labor invested into a project instead of the possibility of future royalties, the interviewees see that there is a harmful disconnect between how they are remunerated for their creativity and what they feel that creative work should be worth. Additionally, IP does not protect against reputational harm, which the interviewees do care about. They felt that after having invested so much time, professional energy, and love into their craft, they should at least enjoy some level of reputational protection, but IP law does not provide such protection for them. Thus, there is an interesting problem where interviewees underutilized the types of protections that did exist (rent seeking), but were not able to achieve the type of protection they wanted (reputation protection and rights of integrity).¹⁷

Given the mismatch outlined in the first two chapters, the third chapter discusses the mismatch between what successful artists, scientists, and creators would like (salary and hourly pay) more often than “holding out for royalties.”¹⁸ These innovators are not profit maximizers like some corporations, but instead they are interested in autonomy and the stability necessary to engage in future creation. They are not interested in taking risks, but instead having a stable and secure space from which to create. One of the reasons this book makes such an excellent contribution is that Silbey knows IP law, and so she can easily

11. *Id.* at 53.

12. SILBEY, *supra* note 7, at 53.

13. *Id.* at 55.

14. *Id.* at 59.

15. *Id.*

16. *Id.* at 67.

17. SILBEY, *supra* note 7, at 77.

18. *Id.* at 89-90.

see and point out where those not trained in the law are failed by it. For example, most of the artists she talked to had little to no idea what the royalty structure in their contract was.¹⁹ However, while enforcement of IP will not accomplish the goals of creators, businesses see lots of value in IP as a way of attracting early investment.²⁰ Patents especially can have a “signaling function” for investors and are used as an indication of innovation in a company.²¹ Despite the functions of some IP in creating business opportunities (patents), the under-enforcement of IP is also a business strategy, especially early on when a company is seeking to build name recognition.²² As a result of the interviews, Silbey is able to clarify how IP laws are mismatched with what creators and innovators want. IP is less an incentive to create than the courts believe but remains relevant for businesses engaged in the creation of IP.²³

A theme that came up in the first few chapters is the focus of the fourth—the role of reputation in the realm of intellectual property. Reputation, according to the interviewees, is the thing they care about most.²⁴ As Silbey points out, “IP’s blunt protections disserve the multifaceted and contextually specific nature of reputational interests. Here, the misfit between normative claims concerning one’s reputation for creative or innovative work and the legal claims is profound.”²⁵ Reputation is understood as essential and part of a person’s identity (or even a corporation’s identity).²⁶ Reputation is so significant to interviewees that they tend to exaggerate the value and locate their success in the branding of a company.²⁷ Sadly, the courts have not supported these moral claims to reputation, instead focusing primarily on economic rights under the law.²⁸ While trademark law can provide some reputational coverage, the mismatch between other forms of IP and the protection sought by creators is most significant when dealing with issues of reputation. As Silbey notes, “[r]eputation is hard to ‘own’ in the way that property (or IP) might be owned and defined.”²⁹ Thus, while she does not suggest policy revisions to better protect reputation, it is clear that some creative focus on this area may help keep those that create IP happier and better protected.

Chapter 5 shifts focus to the lawyers and business owners who have an interest in protecting IP for its economic value. This chapter helps to highlight the fact that lawyers produce, manage, and “harvest” IP. As Silbey’s legal interviewees noted, “IP simply does not cross the minds of their creative or innovative clients.”³⁰ Thus, lawyers are often seen as disruptive forces in the creative environment with innovators, especially those working on patentable material, resisting the legal framework lawyers seek to impose. One question

19. *Id.* at 98.

20. *Id.* at 109.

21. *Id.* at 110.

22. SILBEY, *supra* note 7, at 122.

23. *Id.* at 142.

24. *Id.* at 149.

25. *Id.* at 151.

26. *Id.* at 155.

27. SILBEY, *supra* note 7, at 160.

28. *Id.* at 166.

29. *Id.* at 181.

30. *Id.* at 191.

that emerges from the legal interviews is why does the legal paradigm almost always win against the broader intellectual impulse to share? As the lawyers in this chapter indicate, they see much of their job as instructing and/or educating creators about the importance of IP. However, one element of the role lawyers play here seems to be self-serving at best. As Silbey notes, “the legal construct literally ‘makes visible’ the value of creative or innovative work” (suggesting that only those trained in the law can help others understand why IP matters).³¹ However, the legal definition of “creating value” diverges from how innovators might see it. To the lawyer, value is created through the number of patents filed, not through any particular technology these patents might make possible.³² Perhaps the most disconcerting disconnect raised by the book emerges in this chapter. If lawyers have created and continue to articulate a construct that tends to provide “job security” for their own practices but does little to inspire additional creativity, then how might we address this problem?

Chapter 6 takes up the issue of distribution of creative work. One of the key tensions inherent in the concept of intellectual property as *property* is that, unlike tangible property, sharing enhances the value of intellectual property. In fact, one might argue that there is no value in any idea or expression unless it is shared and popularized. However, sharing is at odds with ownership in significant ways. American law actually prioritizes dissemination, not ownership,³³ a fact that is often lost in the contemporary debates to more tightly control the circulation of ideas. Silbey’s interviews provide her with insights that suggest there are numerous attitudes towards the notion of distribution. These include what she calls the “many and more” approach, where as many copies are produced and distributed as possible.³⁴ In many ways, this approach could be attributed to the current state of IP law in the United States and the ongoing push for expanding rights. However, what is interesting about her survey results is that even within the corporate areas where IP is managed and protected most rigorously, there is also room for “building satisfying and productive relationships, and exercising their competencies.”³⁵ That being said, the industries one might predict as caring the most about protecting their rights—software, pharmaceuticals, publishing and film—are the ones that feel the most tension between distribution processes premised upon sharing and gifting and the goal of making money. What is surprising is that Silbey finds “a high tolerance for leaky IP,” meaning that even amongst the perceived maximalists there is a tendency towards flexibility.³⁶

The other forms of distribution Silbey identifies allow for more potential circulation without remuneration. These include what she calls managed performance where the desire to perform the work shapes the distributive model.³⁷ In many areas what is by definition unlawful distribution is seen here as aiding professional success in the long term.³⁸

31. *Id.* at 208.

32. SILBEY, *supra* note 7, at 209.

33. *Id.* at 221.

34. *Id.* at 228.

35. *Id.* at 229.

36. *Id.* at 238.

37. SILBEY, *supra* note 7, at 238.

38. *Id.* at 243.

The final categories of sharing and gifting see monetary rewards as the result of circulation instead of the other way around. These approaches to distribution have been well defined in the open source and open access communities.

So, what do these interviews tell us about intellectual property law? First, that it is not an incentive to create.³⁹ Second, that contrary to popular belief, most creative people continue to work despite the lack of monetary incentives, and while they are concerned about direct copying and appropriation, their interests in reputational protection are undervalued in the system as it exists today.⁴⁰ Third, “[t]he layers of corporate or business interests that dictate control and ownership over creative or innovative work exhaust artists and scientists,” suggesting that what lawyers do is the opposite of what their clients may actually want.⁴¹ Fourth, we should be wary about the impact enhanced and more restrictive IP will have on openness and future innovation.⁴² Fifth, there are benefits to “leaky IP,” because “imperfect control” allows for a beneficial mismatch to exist between the goals of business owners and the goals of creative people.⁴³

Silbey concludes by reminding the reader that her interest in writing this book was to focus on legal stories not legal reform.⁴⁴ That being said, the questions I have relate to what the data tells us about the law and its relation to the protection of creative work. If, indeed, the mismatch between how the law is constructed and what artists would like to see happen is so large, how might we change our legal structures to better protect what artists and inventors would like to see protected? More significantly, why do we have the laws we have today if even those most adamantly pro-IP suggest in interviews that they are flexible about how they impose their protective rights? Who is controlling the public discourse on IP and pushing towards even more expansionist protection, broader penalties, and the like if it is not the industry players and business people who are poised to maximize their profit from strong IP laws?

One possible answer is that there are, of course, powerful business interests that lobby for stronger protection that are not reflected in the interviews. Company policy may not resonate with any given corporate lawyer, putting her or him in a position of seeking to balance two conflicting approaches to IP. Thus, the institutional articulation of strong IP somehow transcends any one individual’s personal feelings about how much protection is necessary.

Another possible answer is hinted at throughout the text—the judicial process itself plays a role in expanding the scope of IP protection. For example, how we understand fair use emerges not from the statute but from the interpretation of that statute brought to us via legal challenges and judicial decisions. Thus, while the lawyers Silbey interviews suggest that they are flexible in their approach to IP enforcement, they undeniably have an underlying drive to achieve the best for their client even if it might set a bad precedent for all other creative work. If, for example, an in-house lawyer for a technology firm with a patent portfolio seeks to defend its patents, the litigation that ensues may have significant

39. *Id.* at 277.

40. *Id.*

41. *Id.* at 278.

42. SILBEY, *supra* note 7, at 279.

43. *Id.* at 281.

44. *Id.* at 284.

policy implications for everyone. Policy by litigation is one of the outcomes that result from so many lawyers now being trained in intellectual property law. With so many lawyers trained to be IP attorneys it should come as no surprise that there is more litigation and attention to the importance of IP. It has become a self-fulfilling prophecy.

Thus, in the end, while Silbey does not make any specific policy recommendations, the data she has used as the foundation for her book can and should be used to help rethink and reshape IP policy. While there might be additional players in the IP system to interview, Silbey's research method assures us that there was sufficient redundancy in the stories told to suggest a kind of narrative coherence across very diverse fields of creativity. The question is how can we shape this increasingly important field of law to better address its constitutional mandate—to promote progress in the arts and sciences?